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No. 96-1059

In the Supreme Court of the United States

OCTOBER TERM, 1996

SYCUAN BAND OF MISSION INDIANS, ET AL.,
PETITIONERS

v.

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2710(d)(1)(B), makes it unlawful for Indian Tribes to operate forms of Class III gaming that state law completely prohibits.

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This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States.

STATEMENT

1. a. Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*, in order to establish a system for regulating gaming activities on Indian lands. IGRA divides Indian gaming into three categories. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. 2703(6). Class II gaming consists of bingo (including, if played at the same location, pull tabs, lotto, punch boards, tip jars, and other games similar to

bingo); non-banked card games[1] not illegal under the laws of the State; and card games actually operated in particular States prior to the passage of the Act. 25 U.S.C. 2703(7)(A). The Act expressly excludes from Class II gaming "any banking card games, including baccarat, chemin de fer, or blackjack (21)"; "electronic or electromechanical facsimiles of any game of chance"; and "slot machines of any kind." 25 U.S.C. 2703(7)(B). Class III gaming—at issue here—is defined as "all forms of gaming that are not class I gaming or class II gaming," including banked card games such as baccarat, chemin de fer, and blackjack (21); casino games such as roulette, craps, and keno; slot machines; sports wagering and parimutuel wagering on horse racing, dog racing, or jai alai; and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4.

Under IGRA, "Class III gaming activities" are lawful on Indian lands only if (1) authorized by an ordinance adopted by the governing body of the Tribe and approved by the Chairman of the National Indian Gaming Commission; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). This case concerns the proper interpretation of the second of those requirements.

b. A Tribe that would like to operate a Class III gaming activity initiates the compacting process by requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(3)(A). Upon receiving such a request, the State is obliged to "negotiate with the Indian tribe in good faith to enter into such a compact." *Ibid.* If the State fails to

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[1] A card game is "banked" if a gaming operator participates in the game with the players and acts as a house bank, paying all winners and retaining all other players' losses. A card game is a "percentage" game if the operator has no interest in the outcome of the game but takes a percentage of all amounts wagered or won. Pet. App. 11 n.10.

negotiate in good faith, the Tribe may initiate an action against the State in federal district court. 25 U.S.C. 2710 (d)(7)(A)(i). If the court finds that the State has failed to negotiate in good faith, it must order the State and the Tribe to conclude a compact within 60 days. 25 U.S.C. 2710 (d)(7)(B)(iii). If the State and Tribe fail to conclude a compact within that period, each party must submit its last best offer to a court-appointed mediator, who is to select one of those two proposals. 25 U.S.C. 2710(d)(7)(B) (iv). If the State consents to the mediator-selected proposal, it is treated as a Tribal-State compact. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, the Secretary of the Interior may prescribe procedures for Class III gaming. 25 U.S.C. 2710(d)(7)(B)(vii). Under this Court's decision in *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996), a State has a right to avoid a Tribe's suit in federal court by asserting its Eleventh Amendment immunity.

2. Seven Indian Tribes requested the State of California to negotiate a compact permitting the operation of (1) stand-alone electronic games, such as electronic pull tabs, video poker, video bingo, video lotto and video keno; and (2) banked and percentage card games. Pet. App. 10-11 & n.9. California criminal law prohibits the operation of slot machines, Cal. Penal Code § 330a (West 1988), as well as banked and percentage card games, *id.* § 330. The State refused to enter into negotiations on the ground that the Tribes' proposed games fall within those state statutory prohibitions. Pet. App. 11.

The seven Tribes and the State agreed to seek a judicial determination of whether California "permits" the Tribes' proposed gaming activities within the meaning of 25 U.S.C. 2710(d)(1)(B), such that the activities could be lawful under IGRA if they were conducted in conformance with a Tribal-State compact. See Pet. 5. The seven Tribes

filed a complaint for a declaratory judgment on that issue. Pet. App. 11. Separate suits were filed by other Tribes, and the suits were consolidated. *Ibid.*

On cross-motions for summary judgment, the district court ruled for the Tribes in part and for the State in part. Pet. App. 28-67. The court rejected the Tribes' argument that "if California permits *any* Class III games to be played, all Class III games should be negotiable in a Tribal-State Compact." *Id.* at 46 n.16. Instead, the district court adopted a two-part test to determine whether a proposed gaming activity is subject to negotiation. *Id.* at 44. First, if a State permits a proposed game to be played for any purpose by any person, "the plain language of IGRA establishes that the game is the proper subject of a Tribal-State compact." *Ibid.* Second, if the proposed game is not permitted, it is nonetheless a proper subject of bargaining unless the State's "public policy, as determined from the totality of its laws," prohibits the game. *Id.* at 44-45. The district court derived that second part of its test from its reading of *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). See Pet. App. 43-44. *Cabazon* held that Public Law 280, ch. 505, 67 Stat. 588 (as amended, 18 U.S.C. 1162, 28 U.S.C. 1360), authorized specified States to enforce on Indian lands their "'criminal/prohibitory' laws," but not their "'civil/regulatory' laws." 480 U.S. at 209. The Court explained that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Ibid.* The "shorthand test," this Court observed, "is whether the conduct at issue violates the State's public policy." *Ibid.* The district court in this case concluded that IGRA incorporates the *Cabazon*

distinction between criminal/prohibitory and civil/regulatory statutes, which it understood to require a general inquiry into the State's public policy regarding the proposed game. Pet. App. 43-45.

Applying its two-part test, the district court first held that the Tribes' proposed electronic games were subject to negotiation under the first part of the test. Pet. App. 46-49. The court was of the view that "the State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes," and on that basis it concluded that IGRA expressly "requires that the use of electronic equipment on the Tribes' lands be held a proper subject for a Tribal-State compact." *Id.* at 48-49.

Turning to the second group of games the Tribes proposed, the district court noted that the State does not permit banking or percentage card games to be played for any purpose by any person. The court therefore held that those games are not subject to negotiation under the first part of the test it had fashioned. Pet. App. 50-51. Turning to the second part of the test, the court did not find a clear public policy against all banked or percentage card games, since California permits many banked and percentage *non*-card games (such as the state lottery and parimutuel wagering on horse racing) and allows card rooms to operate card games on a non-banked and non-percentage basis. *Id.* at 52-54. The court held, however, that banked and percentage card games using traditional casino game themes violate California's public policy against casino gaming. The court discerned that public policy from a constitutional prohibition against casinos, a statutory prohibition precluding the state lottery from operating games with casino themes, and a statutory prohibition precluding card rooms from operating casino card games. *Id.* at 54-55.

The district court was unable to determine whether California has a public policy against banked or percentage card games that do not use traditional casino themes. Pet. App. 55. Faced with that uncertainty, the court concluded that the parties should negotiate their differences concerning those games. *Ibid.*; *id.* at 66.

3. a. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 10-24. The court held that Section 2710(d)(1)(B) establishes an unambiguous test for determining whether a form of gaming is subject to negotiation. *Id.* at 16-17. The court concluded that the key term in Section 2710(d)(1)(B) is "permit," which it found to be unambiguous, meaning "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." *Id.* at 17 (quoting *Black's Law Dictionary* 1140 (6th ed. 1990)). Applying that definition, the court held that the State had no duty to negotiate with the Tribes over banked or percentage card games or slot machines other than video lottery terminals, since "California does not allow banked or percentage card gaming" and, "[w]ith the possible exception of video lottery terminals, electronic gaming machines fitting the description of 'slot machines' are prohibited." *Ibid.* (footnote omitted).

The court of appeals did not find it relevant that the State "allows games that share some characteristics with banked and percentage card gaming"—*i.e.*, that the State allows banked and percentage games *other* than card games, and *non*-banked, *non*-percentage card games. Pet. App. 17-18. Nor did the court view it as significant "that the state lottery, if not technically a slot machine, is functionally similar to one." *Id.* at 18. Agreeing with the Eighth Circuit's approach in *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273 (1993), the court held that "IGRA does not require a state to negotiate over one

form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming." Pet. App. 18. Under the statutory text, the court explained, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.* at 19.

The court of appeals rejected the Tribes' reliance on *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991), in which the Second Circuit held that Connecticut was required to negotiate over games of chance because Connecticut permitted charities to operate such games (albeit subject to stringent limitations) during "Las Vegas nights." Pet. App. 22 n.13. The court concluded that the Second Circuit reached the "correct result" in *Mashantucket*, because "IGRA's text plainly requires a state to negotiate with a Tribe over a gaming activity in which the state allows others to engage." *Ibid.* Although the Second Circuit relied on a reference to *Cabazon*'s criminal/prohibitory test in the legislative history of IGRA discussing Class II gaming (see 913 F.2d at 1029-1030), the court below viewed that aspect of the Second Circuit's opinion as unnecessary to support the result in that case. Pet. App. 22 n.13.

Based on its analysis of IGRA's text, the court of appeals "affirm[ed] the district court's judgment that the State need not negotiate over banked or percentage card games with traditional casino themes." Pet. App. 23. The court remanded to the district court "to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise." *Ibid.*[2]

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[2] Following the court of appeals' decision, the California Supreme Court issued its decision in *Western Telcon* v. *California State Lottery*, 13 Cal.4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812 (1996). In that case, the California Supreme Court held that a computerized keno game

b. The Tribes' petitions for rehearing and suggestions for rehearing en banc were denied. Pet. App. 4. Judge Canby (joined by Judges Pregerson, Reinhardt, Hawkins, Ferguson and Norris) dissented from the denial of rehearing en banc. *Id.* at 4-10. In Judge Canby's view, the key question of statutory interpretation "is not what Congress meant by 'permits,' but what Congress meant by 'such gaming.' Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming?" *Id.* at 7-8. Judge Canby concluded that "Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game." *Id.* at 8. Thus, in Judge Canby's view, if a State allows *any* form of Class III gaming, it must negotiate with a Tribe concerning *all* forms of Class III gaming that the Tribe proposes, even forms that are subject to prohibitory state laws. *Id.* at 6-7, 8-9.

DISCUSSION

The court of appeals correctly held that IGRA does not require states to negotiate over forms of Class III gaming that state law completely prohibits. That holding does not conflict with the decision of any other court of appeals. The court's decision is also interlocutory, and further proceedings on remand may clarify the practical effect of the court's holding or even assist the parties in reaching compacts that are satisfactory to the Tribes. The petition for a writ of certiorari should therefore be denied.

1. Under 25 U.S.C. 2710(d)(1)(B), "Class III gaming activities shall be lawful on Indian lands only if such

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operated by the state lottery was not lawful, because computerized keno is a banked game, and the State Lottery Act does not authorize banked games. The California Supreme Court did not reach the question whether the Lottery Act permits the operation (in the form of a state lottery) of machines that would otherwise fall within the state statutory prohibition of slot machines.

activities are * * * located in a State that permits such gaming for any purpose by any person, organization or entity." As the court of appeals concluded, that statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming. That has been the consistent position of the United States.[3]

a. The term "permit" can have more than one meaning: It can mean "to expressly assent or agree to the doing of an act," or it can mean "to acquiesce, by failure to prevent." Pet. App. 17 (quoting *Black's Law Dictionary* at 1140); see also note 7, *infra*. The term "permit," however, is unambiguous with respect to the question presented in this case. Under any definition of "permit," when a State completely prohibits a form of gaming, it does not permit it.

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[3] See 96-2162 Gov't C.A. Br. at 11-32, *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), petition for cert. pending, No. 96-1617 (filed Apr. 10, 1997); 90-7508 U.S. Amicus Br. at 27 n.14, *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); see also 90-871 U.S. Amicus Br. at Pet. Stage at 11-15, *Connecticut* v. *Mashantucket Pequot Tribe*, cert. denied, 499 U.S. 975 (1991). The Solicitor of the Interior took a similar position in a legal memorandum for the Assistant Secretary for Indian Affairs, dated April 9, 1991, concerning the procedures adopted by the Secretary under 25 U.S.C. 2710(d)(7)(B)(vii) for gaming to be operated by the Mashantucket Pequot Tribe after the State and the Tribe failed to reach a negotiated compact. The Solicitor stated that in the event that the court-appointed mediator "ch[o]se a compact which permitted a type of gaming which was not allowed by that State 'for *any* person, organization, or entity' under 25 U.S.C. §2710(d)(1)(B)," "[t]he Secretary could not establish procedures to implement that type of gaming." Letter from Thomas L. Sansonetti, Solicitor of U.S. Dep't of Interior, to Ass't Secretary for Indian Affairs 6 (Apr. 19, 1991). The Solicitor's memorandum was made available to the public in connection with the Secretary's adoption of procedures for gaming by the Mashantucket Pequot Tribe (see 56 Fed. Reg. 15,746 (1991)), and we have lodged a copy of that memorandum with the Clerk of this Court.

In dissenting from the denial of rehearing en banc, Judge Canby did not dispute that the term "permits" is unambiguous with respect to the question presented in this case. He asserted, however, that the term "such gaming" is ambiguous: According to Judge Canby, it could either refer to the entire category of Class III games, so that if a State permits one form of Class III gaming, it would have to negotiate over all forms of Class III gaming; or it could refer to the specific forms of gaming at issue, so that if a State completely prohibits the specific forms of Class III gaming that a Tribe seeks to operate, it would have no duty to bargain with respect to those games. Pet. App. 7-8. On closer inspection, the supposed ambiguity dissolves.

Section 2710(d)(1) makes it lawful for a Tribe to operate "Class III gaming activities" only if "such activities" are (1) "authorized by [a Tribal] ordinance" that is "approved by the Chairman"; (2) located in a State that permits "such gaming" for any purpose by any person, organization or entity, and (3) "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). The key phrase "such gaming" in the second requirement necessarily refers back to "Class III gaming activities" in the introductory clause, and that clause applies to all three requirements. In context, the "Class III gaming activities" that are "authorized by an ordinance" and "conducted in conformance with a Tribal-State compact" can only be the forms of gaming that the Tribe seeks to operate; it cannot refer to the entire category of Class III games. Because "such gaming" in the second requirement refers to the same activities, it also necessarily refers to the forms of Class III gaming that the Tribe seeks to operate and not to the entire category of Class III games. By contrast, if Congress had wanted to formulate the standard described by Judge Canby, it could have provided that Class III

activities are lawful when such activities are "located in a State that permits *any Class III gaming activity* for any purpose, by any person, organization, or entity." Congress, however, did not adopt that categorical approach.

Moreover, the background of IGRA shows that Congress sought through the compacting process to accommodate "significant governmental interests" of the States. S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988). Yet, under Judge Canby's categorical approach, a State would be required, as a matter of federal law, to negotiate with Indian Tribes concerning forms of gaming that the State's own criminal laws completely bar, simply because the State permits some *other* form of Class III gaming. For example, any State that conducts a lottery would have a federal statutory duty to negotiate with Tribes concerning casino gambling and slot machines, even if the State's laws completely outlaw the latter forms of gaming. Nothing in Section 2710(d)(1)(B) suggests that Congress intended that sort of displacement of the significant governmental interests of the States which Congress chose to respect when it enacted IGRA's compacting process for Class III gaming. To the contrary, it imposes a negotiating obligation concerning only "such gaming" as the State "permits."[4]

At the same time, IGRA's compacting process affords reciprocal protection for the significant governmental interests of Tribes by requiring the States to negotiate over a form of Class III gaming as long as the State permits it "for any purpose by any person." That provision enables a Tribe to negotiate terms and conditions

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[4] The legislative history of IGRA also indicates that Congress sought, through the compacting process, to afford the parties an opportunity "to make use of existing State regulatory systems." S. Rep. No. 446, *supra*, at 13. Congress would not have expected state regulatory systems to be available for the regulation of forms of gaming that the State completely prohibits.

different (and more favorable) than those applicable to non-Indian gaming operators under state law for any Class III gaming activities that the State, after weighing its own public policies, has not seen fit to outlaw entirely. The IGRA compacting process thus deliberately affords a Tribe the potential for attaining a considerable competitive advantage with respect to any form of gaming that the State has not foreclosed.

b. Petitioners err in contending (Pet. 11-12) that IGRA calls for an independent inquiry into the State's "public policy" with respect to gaming that the State completely prohibits. The text of IGRA supplies its own test of whether a Tribe's proposed gaming activity violates a State's public policy: If a State permits the operation of a form of gaming "for any purpose by any person, organization or entity," 25 U.S.C. 2710(d)(1)(B), a Tribe's operation of that form of gaming does not violate the State's public policy in the relevant (statutory) sense, and the State must negotiate over that form of gaming. If, by contrast, a State prohibits a form of gaming to all persons for all purposes, a Tribe's operation of that form of gaming *would* violate the State's public policy in the relevant sense, and the State would have no duty to negotiate with respect to that form of gaming.

Petitioners' reliance on *Cabazon*, *supra*, in support of their proposal for a more general "public policy test" under IGRA is misplaced. See Pet. 12, 13, 14, 17, 23; Reply Br. 4, 6, 7. In *Cabazon*, the Court made passing reference to "whether the conduct at issue violates the State's public policy" (480 U.S. at 209) only as a "shorthand" for the actual test it had announced in the immediately preceding sentence (*ibid.*):

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally

> permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Applying that terminology of *Cabazon* to this case, the clear intent of California law concerning the operation of banked and percentage card games and non-lottery slot machines "is generally to prohibit [that] conduct." Those state laws therefore would unquestionably have been regarded as criminal/prohibitory under *Cabazon* prior to IGRA's replacement of Public Law 280 as the federal law governing what Indian gaming is lawful in California. And continuing with the *Cabazon* terminology quoted above, just as California law does not "generally permit[] the conduct [of banked and percentage card games and non-lottery slot machines], subject to regulation," those card games and slot machines, if conducted by California Tribes, would not be located in a State that "permits such gaming for any purpose by any person" within the meaning of IGRA.

In short, nothing in either *Cabazon* or IGRA suggests that if a court concludes that a form of gaming is completely prohibited by state law, the court should nevertheless engage in a further and independent inquiry into whether that form of gaming is consistent with the State's "public policy" in a more general sense, in order to determine whether such gaming is a mandatory subject of negotiation for the State. Again, *Cabazon*'s reference to "public policy" was simply a "shorthand" description of the determination of whether the state law is criminal/prohibitory; if it is, that is the end of the inquiry. Where the State has a complete criminal prohibition against a

certain form of gaming, that prohibition *is* the State's public policy.[5]

c. Once a State permits a form of gaming for any purpose by any person, Section 2710(d)(1)(B) does not require a Tribe to comply with a State's entire regulatory scheme for that form of gaming. The text and legislative history of IGRA make clear that a State must negotiate with a Tribe concerning the regulatory system that will apply on Indian lands to forms of gaming that the State permits. 25 U.S.C. 2710(d)(3)(C) (listing as subjects of negotiation the enforcement of regulatory laws, the division of regulatory responsibility between the Tribe and the State, and the standards for the operation of an activity); S. Rep. No. 446, *supra*, at 14 (subjects of negotiation include "days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility").

A State may not avoid its statutory duty to negotiate over the regulation of forms of gaming that it permits by recharacterizing a regulatory law as a prohibition on a distinct form of gaming that is defined by the limitations the State imposes for regulatory purposes. For example, a

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[5] This Court pointed out in *Cabazon* that the particular state law at issue there (Cal. Penal Code Ann. § 326.5 (West Supp. 1987)) "does not entirely prohibit the playing of bingo," but rather "permits" it subject to certain conditions. 480 U.S. at 205. The Court nevertheless noted that "an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory," but it ultimately accepted the court of appeals' determination that California's bingo statute was civil/regulatory in character for purposes of analysis under Public Law 280. *Id.* at 209-210. The Court noted, by way of contrast, that "certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987)." 480 U.S. at 210. There was no suggestion that with respect to *those* games, some further "public policy" inquiry would have been necessary to determine whether the statutory provisions outlawing them were "criminal/prohibitory" under the framework the Court adopted.

State that permits certain card games, but limits the wagers on those games, may not avoid its duty to bargain over wagering limits on the card games by recharacterizing its regulatory law as a complete prohibition on the form of gaming known as "high stakes card games." Once a State permits card games of a certain type, it has a duty to negotiate over the wagering limits for those games.

In some circumstances, a question may arise concerning whether a state law prohibits a distinct form of gaming or instead regulates the manner in which a permitted form of gaming may be played. Several hypothetical examples may illustrate the point. If state law prohibits five-card stud poker but permits seven-card draw poker (or prohibits parimutuel wagering on dog racing but not on horse racing), a question could arise as to whether that state law prohibits a distinct form of gaming known as "five-card stud poker" (or "dog racing"), or instead regulates the manner in which the permitted form of gaming known as "poker" (or "animal racing") may be conducted. If characterized in the former way, the State would have to negotiate concerning only seven-card draw poker (or horse racing); if characterized in the latter way, the State would have to negotiate over all poker games (or all animal racing). The relevant question in such a case would be whether, in light of traditional understandings and the text and legislative history of IGRA, the State has reasonably characterized the relevant state laws as completely prohibiting a distinct form of gaming.[6] If the State has not reasonably so characterized its laws, it would have a duty to negotiate with respect to the gaming.

This case, however, raises no question as to whether the relevant state laws merely regulate permitted forms of

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[6] In close cases, it may be relevant as well to examine the purposes behind the state laws that, for example, permit five-card stud poker but not seven-card draw poker.

gaming or instead completely prohibit distinct forms of gaming.[7] The state laws at issue here absolutely prohibit banked and percentage card games and non-lottery slot machines, and California could reasonably treat those as distinct forms of gaming for purposes of framing its criminal prohibitions. See 25 U.S.C. 2703(7)(B) (excluding banked card games and slot machines from Class II gaming); 25 C.F.R. 502.4 (treating as distinct forms of gaming banked card games, banked casino games, slot machines as defined in 15 U.S.C. 1171(a)(1), electronic facsimiles of games of chance, sports betting, parimutuel wagering, and lotteries). Because California does not "permit[] such gaming for any purpose by any person," the court of appeals correctly held that California has no duty to negotiate over banked or percentage card games or non-lottery slot machines.

2. a. Petitioners contend (Pet. 14) that the decision below conflicts with the Second Circuit's decision in *Mashantucket*, *supra*. There is, however, no such conflict.

In *Mashantucket*, the Tribe sought to operate casino games that the State of Connecticut permitted charitable organizations to operate on "Las Vegas nights," albeit subject to stringent regulatory limitations. 913 F.2d at 1026 & n.5. The district court ordered the State to negotiate with the Tribe for the purpose of forming a compact governing the conduct of the same types of games on tribal lands, *id.* at 1026-1027, and the Second Circuit affirmed, *id.* at 1033. The Second Circuit rejected the State's contention that, under Section 2710(d)(1)(B), the Tribe could operate casino games only if it agreed "to the

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[7] This case likewise does not involve a situation in which state law neither expressly prohibits nor expressly authorizes the gaming at issue. In that situation, it would similarly be necessary to determine whether state law "permits" such gaming within the meaning of 25 U.S.C. 2710(d)(1)(B).

entire state corpus of laws and regulations governing such gaming," *id.* at 1030-1031, including "the status of the sponsoring organization, size of wagers, character of prizes, and frequency of operations," *id.* at 1029. The Second Circuit reasoned that, because Connecticut allows charitable organizations to operate the specified casino games on Las Vegas nights, it "permits" such gaming within the meaning of Section 2710(d)(1)(B) and must negotiate with the Tribe on how those games may be conducted on Indians lands. *Id.* at 1029-1032. There is no inconsistency between the Second Circuit's holding that a State must negotiate concerning forms of gaming its laws permit, albeit subject to extensive regulation, and the Ninth Circuit's holding in this case that a State need not negotiate with respect to forms of gaming that its laws completely prohibit. To the contrary, the Ninth Circuit in this case expressly approved the result reached by the Second Circuit in *Mashantucket*. Pet. App. 22 n.13.

Petitioners contend (Pet. 13-14) that there is nonetheless a conflict, because the Second Circuit relied on the reference in IGRA's legislative history to *Cabazon*'s criminal/prohibitory test. See 913 F.2d at 1029-1030. The Second Circuit, however, ultimately rested its conclusion on the text of 2170(d)(1)(B).[8] Moreover, while the Second Circuit looked to *Cabazon*'s criminal/prohibitory test as illuminating IGRA's statutory test of whether a State "permits" (for any purpose by any person) the forms of gaming that a Tribe proposes, it did not suggest that where, as here, that gaming *is* prohibited under that criminal/prohibitory test, a court nevertheless should engage in a further, independent inquiry into the State's "public policy" concerning that gaming. Accordingly,

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[8] See 913 F.2d at 1031-1032 (rejecting Connecticut's reliance on cases discussing the *Cabazon* test on the ground that they did not involve IGRA's specific statutory text).

nothing in the Second Circuit's *Mashantucket* decision suggests that it viewed the *Cabazon* test to require a State to negotiate over forms of Class III gaming its laws absolutely prohibit, simply because the State permits other Class III games. There is therefore no reason to believe that the Second Circuit would disagree with the Ninth Circuit's holding in this case that California need not negotiate over banked and percentage card games or non-lottery slot machines, which are absolutely barred by state law.

b. Petitioners similarly err in asserting (Pet. 15-16) a conflict between the decision below and the Tenth Circuit's decision in *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422 (1994). This Court vacated and remanded *Ponca Tribe* for further consideration in light of *Seminole Tribe*. 116 S. Ct. 1410 (1996).

In any event, the statement in *Ponca Tribe* relied upon by petitioners does not conflict with the decision in this case. In rejecting a Tenth Amendment challenge to IGRA, the Tenth Circuit stated:

> IGRA permits the states to negotiate tribal-state compacts in accordance with the views of the local electorate. If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. § 2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the *state* to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe.

37 F.3d at 1434. Petitioners apparently believe that this passage means that a State which permits one form of Class III gaming must negotiate over all forms of Class III gaming. If anything, however, the passage suggests the

opposite. Moreover, the Tenth Circuit had previously held in *Citizen Band Potawatomi Indian Tribe* v. *Green*, 995 F.2d 179, 181 (1993), that a compact may not authorize gaming devices that are forbidden by state law.

Petitioners' assertion (Pet. 17) that there is a conflict between the decision below and the Eighth Circuit's decision in *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (1990), is also incorrect. In that case, the Eighth Circuit held that a Tribe could operate a form of Class II gaming permitted by the State, without complying with all the State's regulatory requirements for that game. *Id.* at 365-368. Interpreting language relating to Class II gaming that is similar to that at issue here, the court concluded that Congress "intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 365. That reasoning is fully consistent with the form-specific analysis adopted by the court of appeals in this case.

The Eighth Circuit subsequently adopted a form-specific analysis for Class III games in *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273 (1993). There, the court held that the State did not have an obligation to negotiate over traditional keno simply because the State permitted video keno. *Id.* at 278-279. The court reasoned that "[t]he 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit." *Id.* at 279. There is therefore no conflict between the Eighth and Ninth Circuits concerning the meaning of Section 2710(d)(1)(B).

3. Finally, because the court of appeals remanded to the district court to consider "whether California permits the operation of slot machines in the form of the state

lottery or otherwise" (Pet. App. 23), the decision below is interlocutory. This Court ordinarily declines to review interlocutory decisions, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari), and there is no reason to depart from that general practice here. The district court's resolution of the question whether the State permits slot machines in the form of a lottery will help to clarify the practical consequences of the court of appeals' decision in this case. Moreover, once the district court resolves that issue, it could set the stage for a new round of negotiations that could result in a compact that is satisfactory to all parties.

Indeed, the State is already engaged in negotiations with another Tribe concerning electronic lottery games. Memorandum of Nine Respondent Indian Tribes at 3-4. If those negotiations are successful, it could result in a model compact that will be satisfactory to all of the Tribes.[9]

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[9] Contrary to the suggestion of the respondent Tribes, there is no occasion for the Court to delay its disposition of the certiorari petition pending the current negotiations. Those negotiations cannot definitively resolve the question whether gaming the Tribes propose is "permitted" by state law. IGRA's requirements that a Class III gaming activity be conducted pursuant to a Tribal-State compact *and* be located in a State that "permits such gaming for any purpose by any person" are independent prerequisites to lawful Class III gaming. A compact would address only the former requirement; this case addresses the latter. Of course, if a State enters into a compact allowing a particular form of gaming, that action by the State would presumably reflect its determination that that gaming *is* permitted by the State. And in some instances, a negotiated compact might change state law (*e.g.*, if it is enacted by the state legislature, or if the Governor has been delegated the necessary authority under state law), so that gaming that theretofore had been prohibited would become permitted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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